No. 03-388

IN THE

Supreme Court of the United States

DENNIS BATES, *et al.*,
Petitioners,

v.

DOW AGROSCIENCES, LLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF E.I. DU PONT DE NEMOURS AND COMPANY, MONSANTO COMPANY, AND SYNGENTA CROP PROTECTION, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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November 24, 2004

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QUESTION PRESENTED

Whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.*, preempts petitioners' state tort claims alleging that the application of respondent's herbicide damaged petitioners' peanut crops.

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INTERESTS OF *AMICI CURIAE* [1]

Amici curiae E.I. Du Pont de Nemours and Company, Monsanto Company, and Syngenta Crop Protection, Inc., manufacture products whose labels are regulated by the Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.* *Amici* frequently face lawsuits relating to the content of their EPA-approved labels, which are predicated on state statutory and common law theories of liability. Such lawsuits, if adjudicated under state law, would create a conflicting state-by-state patchwork of labeling and packaging requirements and thus undermine the uniform federal regulatory regime Congress created in FIFRA. *Amici* have a significant interest in the proper interpretation of FIFRA's express preemption provision to further the explicit statutory goal of uniformity.

Further, as commercial participants in a national market dependent upon regulatory consistency and uniformity, *amici* have a significant interest in the proper development and clear articulation of the general law of preemption. In particular, *amici* believe that the so-called presumption against preemption applies only in instances where "Congress has legislated in a field which the States have traditionally occupied," *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and not "where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000). Where the assumption applies that Congress does not lightly displace historic state police power, *amici* seek to ensure that it is given the proper weight as a

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[1] Petitioners and Respondent have consented to the filing of this brief. Consistent with Rule 37.6, this brief is not authored in whole or in part by counsel for any party. No person, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

background interpretive principle and not as a dispositive presumption or clear statement rule.

STATEMENT OF THE CASE

Amici adopt the statement of the case presented in the Brief for Respondent. For the Court's convenience, *amici* set forth below the facts most salient to the analysis that follows.

Federal regulation of agricultural chemicals began with the Insecticide Act of 1910. Ch. 191, 36 Stat. 331. In 1947, Congress replaced that statute with FIFRA and required federal registration of all pesticides. FIFRA, ch. 125, §§ 3-4, 61 Stat. 166-67 (1947). FIFRA also gave the Secretary of Agriculture discretion to ask an applicant to submit a description of the tests and results supporting the information, claims and directions for use on each pesticide's label. *See* § 4a(4), 61 Stat. 167.

The Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973, revised FIFRA in light of "a growing perception that the existing legislation was not equal to the task of safeguarding the public interest." *Ruckelshaus* v. *Monsanto Co.* 467 U.S. 986, 991 (1984). The 1972 amendment directed the EPA to register a pesticide if it determined that:

> (A) its composition is such as to warrant the proposed claims for it;
>
> (B) its labeling and other material required to be submitted comply with the requirements of this subchapter;
>
> (C) it will perform its intended function without unreasonable adverse effects on the environment; and
>
> (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. § 136a(c)(5). As in the original FIFRA, the 1972 amendments did not require the EPA to collect efficacy or

other data in support of product registration. Rather, it clarified the EPA's discretion to "specify the kinds of information which will be required to support the registration of a pesticide." Pub. L. No. 92-516, § 3(c), 86 Stat. 973, 979-80 (1972). The EPA then required applicants to submit data on nearly every aspect of their pesticide. *See* 40 C.F.R. Pt. 158.

Responding to EPA concerns that pre-registration evaluation encumbered too much agency resources, Congress amended FIFRA in 1978 to provide the EPA with direct authority to waive review of pesticide efficacy data during the initial registration process. 7 U.S.C. § 136a(c)(5). However, because the 1978 Amendments did not alter the underlying statutory requirement that a pesticide's "composition is such as to warrant the proposed claims for it," 7 U.S.C. § 136a(c)(5)(A), "each registrant must ensure through testing that his products are efficacious when used in accordance with label directions and commonly accepted pest control practices. The Agency reserves the right to require, on a case-by-case basis, submission of efficacy data for any pesticide product registered or proposed for registration." 40 C.F.R. § 158.640(b)(1).

FIFRA expressly grants states the authority to regulate the sale or use of federally registered pesticides within their jurisdiction. "A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." 7 U.S.C. § 136v(a). However, to ensure national uniformity in the form and content of pesticide labels, FIFRA expressly limits state authority to regulate pesticide labeling or packaging:

> **Uniformity.** Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v(b).

After a seven-year application process, which included submission of scientific data on efficacy, EPA conditionally registered Strongarm on March 8, 2000. JA 63-93. Petitioners, West Texas peanut farmers, used Strongarm and experienced poor crop yields. They sent demand letters to Dow AgroSciences alleging claims under common law and the Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code §§ 17.01 *et seq*. JA 30-40.

Dow sought a declaratory judgment in federal district court that FIFRA and the Texas Uniform Commercial Code barred the farmers' state law claims. JA 13-23. The district court granted Dow's summary judgment motion, holding that section 136v(b) expressly preempted all but one of the farmers' state law claims because those claims constituted state requirements for labeling and packaging in addition to those required under FIFRA. Pet. App. 21a-31a.

The Fifth Circuit affirmed, holding that it is "well-established" that the phrase "any requirements" in section 136v(b) encompasses both positive enactments and state common law. Pet. App. 11a. Noting that the plain text of this provision refers to the statutory requirements of FIFRA and not EPA regulatory actions, the Court rejected Petitioners' argument that their claims are not preempted because EPA does not require data on and evaluate product efficacy prior to registration. Pet. App. 12a-13a. The Fifth Circuit distinguished *American Cyanamid Co.* v. *Geye*, 79 S.W.3d 21 (Tex. 2002), as dealing only with the question of conflict preemption and not whether section 136v(b)'s express preemptive scope includes product effectiveness claims. Pet. App. 13a.

SUMMARY OF ARGUMENT

Petitioners misconstrue and give undue weight to the so-called presumption against preemption. Their argument that the presumption mandates a narrow construction of section

136v(b) and the term "requirements" rests on a misunderstanding of the Distinction between preemption and supremacy and the relationship between express and conflict preemption. The Constitution provides a straightforward structure governing the relationship between federal and state regulatory authority. Any attempt to convert the presumption against preemption from a background assumption to a clear statement rule would upend that structure, particularly where there has been a history of significant federal regulatory presence.

For nearly a century, Congress has regulated pesticide efficacy and labeling. Against this backdrop of pervasive federal regulation, the interpretive principle shifts—certainly not to disfavor, and more likely to prefer, federal displacement of state law.

Absent an artificial presumption, application of ordinary principles of statutory construction demonstrates that Congress intended to preempt state common law claims relating to the labeling of pesticides subject to FIFRA's requirements. The Court has twice held that use of the term "requirements" in express preemption provisions includes state common law tort actions. There is no reason to believe that the term has a different meaning in section 136v(b) of FIFRA.

It is irrelevant to the interpretation of section 136v(b) whether the EPA actually evaluates product efficacy before registration. Instead, the analysis turns on whether product efficacy is a requirement under FIFRA. The 1978 FIFRA amendments did not rescind the efficacy requirement, but simply authorized the EPA not to require data submission or to evaluate product efficacy prior to registration. Therefore, product efficacy is still a requirement under FIFRA and, accordingly, falls within FIFRA's preemptive scope.

ARGUMENT

I. PETITIONERS MISCONSTRUE AND THUS ASCRIBE UNDUE WEIGHT TO THE PRESUMPTION AGAINST PREEMPTION.

Petitioners' argument—that the so-called presumption against preemption dictates that the term "requirements" and the preemptive scope of section 136v(b) be narrowly construed to exclude state common law tort claims, Pet. Br. 21—rests on a misconception of the distinction between preemption and supremacy and the relationship between express and conflict preemption.

Petitioners' argument would convert a background assumption in statutory construction into a clear statement rule, without any constitutional or logical basis. To the contrary, "[t]here is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Although the Court has often repeated the assumption that Congress does not intend lightly to displace the "historic police powers of the States," the weight of this assumption turns on whether "Congress has legislated in a field which the States have traditionally occupied." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Thus, this assumption does not hold "where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000).

Over the course of the last century, the Federal government has pervasively regulated all facets of agricultural production. That regulatory framework includes FIFRA, a "comprehensive regulatory statute." *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 601 (1991) (quoting *Ruckleshaus*, 467 U.S. at 991). Against this "history of significant federal

presence," *Locke*, 529 U.S. at 108, particularly with regard to pesticide labeling, *Mortier*, 501 U.S. at 613, Petitioners' insistence that the presumption against preemption favors a narrow reading of the preemptive scope of FIFRA rings hollow.

A. Ascribing Dispositive Weight to a Presumption Against Preemption Would Upend Established Principles of Constitutional Supremacy.

Petitioners' insistence that a presumption against preemption dictates a narrow interpretation of section 136v(b) rests on a fundamental misconception of the distinction between preemption and supremacy.

The Constitution provides a straightforward structure governing the scope and effect of federal and state legislative authority: Article I, section 8 enumerates the powers of Congress; Article I, section 9 limits the powers of Congress; Article I, section 10 limits the powers of the states; and the Tenth Amendment reserves to the states the powers not delegated to Congress and prohibited to the states. Importantly, clause 2 of Article VI, the Supremacy Clause, provides that congressional enactments consistent with the Constitution "shall be the supreme Law of the Land."

Although the Supremacy Clause prescribes that congressional enactments trump conflicting state law and thus gives Congress "an extraordinary power in a federalist system," *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991), the Clause itself does not authorize Congress to preempt state laws. The Supremacy Clause simply specifies a constitutional choice of law rule, one that prefers valid federal law over conflicting state law. If the clause were meant to be an affirmative grant of congressional power, it would reside in the metropolis of congressional power, Article I, section 8, rather than in the Article VI suburbs.

The history of the Constitution confirms the point. In the decade prior to the Constitutional Convention, internecine disputes in trade and commerce among the states underscored the need for an effective national government with the power to regulate interstate commerce. In 1786, delegates met at Annapolis, Maryland, to discu[illegible] a uniform federal system of commercial regulation. The Annapolis Convention convinced the participants, including James Madison and Alexander Hamilton, that "the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the federal system." 1 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 118 (2d ed. 1907). Recognizing the need to balance state sovereignty with the necessary powers of an effective national government, the Annapolis participants recommended to Congress a general convention to remedy "the important defects in the system of the federal government." *Id.*

Against that backdrop, the Framers in 1787 considered two different approaches to federal and state legislative authority. The Virginia Plan included among its proposed congressional powers the broad authority "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of the Union." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (M. Farrand rev. ed. 1966) (hereinafter "FARRAND"). The alternative New Jersey (or Small State) Plan, on the other hand, did not include such authority among the powers of Congress, but rather separately proposed language similar to the current Supremacy Clause.

During the debates, Madison warned against the "propensity of the States to pursue their particular interests in opposition to the general interest" and advocated "the

negative on the laws of the States as essential to the efficacy & security of the Genl. Govt." 2 FARRAND at 27. Governor Robert Morris of Pennsylvania opposed congressional power to negative state laws, explaining that "[a] law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. Law." *Id.* at 28. The Virginia Plan was defeated by a vote of 3 to 7.

The Convention then adopted a revised version of the New Jersey proposal almost identical to the current Supremacy Clause. *Id.* at 28-29. Consistent with the New Jersey Plan's structure and Morris's explanation, the adopted text does not mention any affirmative authority of Congress, but simply sets forth the hierarchy between federal and state laws.

Any power to preempt state law, therefore, is conferred not by the Supremacy Clause, but by the affirmative grant of congressional powers under Article I, section 8. For example, should Congress legislate pursuant to its powers under the Commerce Clause and wish to include a provision expressly preempting certain state laws, the authority for the preemption provision comes from the Commerce Clause, with help from the Necessary and Proper Clause. The Supremacy Clause then makes clear that the preemption provision trumps state laws that conflict with it.

Accordingly, if there are questions of constitutional policy in preemption—"the Danger . . . that the national, would swallow up the State Legislatures," 1 FARRAND at 160, and the like—the framers answered them with the specific enumerations and limitations of federal legislative power in Article I and the Supremacy Clause in Article VI. To find in this structure a dispositive presumption against preemption, as Petitioners urge the Court to do, is to rewrite the balance envisioned by the Framers—a balance that, it bears reminding, Madison and others thought should have been weighted even more in favor of Congress.

Preemption is not a substantive power of Congress, but rather a method of regulation to further some other substantive congressional authority. In this regard, true conflict preemption is actually not preemption at all, but the paradigmatic operation of the Supremacy Clause to resolve an actual conflict between state and federal law, where it is physically impossible to comply with both federal and state requirements. *See* Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1751 (1992).

Express preemption is simply a type of true conflict preemption, or core supremacy. In addition to any substantive regulatory requirements, Congress may choose further to include a provision preempting all state laws within a defined scope. The Supremacy Clause then makes clear that the preemption provision, like any other provision of federal law, takes precedence over conflicting state laws. All state laws within the scope of the express preemption provision are by definition in conflict with it, and the latter is supreme.

Section 136v(b) provides that States "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." Congress cannot commandeer State legislative processes, *see New York* v. *United States*, 505 U.S. 144, 161 (1992), and thus this provision does not literally prohibit states from adopting requirements for labeling and packaging. Rather, if a State adopts labeling and packaging requirements that are in addition to or different from those required by FIFRA, such requirements would conflict with section 136v(b) and the Supremacy Clause resolves the conflict in favor of FIFRA.

In this and other express preemption cases, therefore, the work of the Supremacy Clause is straightforward. It gives effect to the express preemption clause and tells state and federal judges to prefer the clause to all contrary state laws.

The judicial task is likewise limited: to interpret the express preemption clause and determine whether the state law at issue falls within the preemptive scope. This task does not call for special Supremacy Clause or preemption jurisprudence. It is garden-variety statutory construction.

Statutory construction is, by its nature, contextual. It is therefore natural for the Court to assume that Congress does not lightly displace the "historic police powers of the States," where "Congress has legislated in a field which the States have traditionally occupied." *Medtronic*, 518 U.S. at 485 (quoting *Rice*, 331 U.S. at 230). Thus, the Court in *Mortier* held that Congress's "[m]ere silence" with respect to local governments (as opposed to States) was "inadequate to convey an express preemptive intent." *Mortier*, 501 U.S. at 607.

But Petitioners' reliance on *Mortier* in this case is wholly misplaced. Here, there is no silence: Congress articulated its "express preemptive intent" in section 136v(b). The question, rather, is the scope of such intent and the specific meaning of the word "requirements." By insisting that a dispositive presumption against pre-emption works to change the natural and established meaning of "requirements," and to narrow artificially the scope of the express pre-emption provision, Petitioners would urge on this Court a clear statement rule of statutory construction.

There is no constitutional or logical support for such a rule. All other narrow construction or clear statement rules are predicated on a constitutional concern independent of the Supremacy Clause. For example, the presumption against congressional abrogation of state sovereign immunity and the attendant requirement of an "unmistakably clear" legislative statement abrogating such immunity derives from the Eleventh Amendment. *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989); *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985). Similarly, the clear statement rule of *Gregory* v.

Ashcroft, 501 U.S. 452 (1991), sprouts from the respect for state sovereign prerogative protected by the Tenth Amendment. Setting judicial qualifications "is a decision of the most fundamental sort for a sovereign entity," even though the Supremacy Clause permits Congress to "impose its will on the States." *Gregory*, 501 U.S. at 460.

Indeed, the Supremacy Clause evinces, if anything, a presumption favoring pre-emption. Without an independent constitutional basis, such as the Tenth or Eleventh Amendments, there is nothing to counterbalance the Constitution's express preference for federal supremacy. Absent a countervailing constitutional concern, finding a clear statement rule against preemption in the Supremacy Clause is akin to conjuring from the Eleventh Amendment a presumption favoring federal jurisdiction over suits against States.

As a practical matter, ascribing such dispositive weight to the presumption against preemption as Petitioners suggest would render impractical any use of express preemption and subvert the structural relationship between preemption and supremacy and between conflict and express preemption. "The statute that says anything about pre-emption must say everything; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power. If this is to be the law, surely only the most sporting of Congresses will dare say anything about preemption." *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 548 (1992) (Scalia, J., concurring in part, dissenting in part).

B. Any Background Assumption Against Preemption is Contradicted by the History of Significant Federal Presence in Regulating Agricultural Production and Pesticide Marketing.

Because preemption analysis is, at bottom, an exercise in statutory construction, "[t]here is not—and from the very nature of the problem there cannot be—any rigid formula or

rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Rather, courts interpreting a preemption provision, like any other statutory provision, must look to the background against which Congress legislates. *See Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 94 (2000) (Stevens, J., dissenting) ("Whenever Congress passes a statute, it does so against the background of state law already in place; the propriety of taking national action is thus measured by the metric of the existing state norms that Congress seeks to supplement or supplant.").

Although this Court does not lightly assume that Congress intended to displace the "historic police powers of the States," the weight of this assumption naturally turns on whether "Congress has legislated in a field which the States have traditionally occupied." *Medtronic*, 518 U.S. at 485 (quoting *Rice*, 331 U.S. at 230). Stated conversely, "an 'assumption' of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108 (citations omitted).

Agricultural production and pesticide labeling are areas where there has been a history of significant federal presence. As President Washington stated in his 1796 annual address to Congress, "It will not be doubted that with reference either to individual or national welfare agriculture is of primary importance . . . . Institutions for promoting it grow up, supported by the public purse; and to what object can it be dedicated with greater propriety?" BRUCE L. GARDNER, AMERICAN AGRICULTURE IN THE TWENTIETH CENTURY 176 (2002).

Recognizing the importance of agriculture to the national economy, early Congresses focused on establishing institutions to promote agricultural production. In 1862, Congress created the Department of Agriculture, 12 Stat. 387 (1862), and passed the Morrill Act, 12 Stat. 503 (1862), which

established the system of land-grant universities that still persists to this day. And in 1887, Congress passed the Hatch Act, 24 Stat. 441 (1887), which provides federal support for state agricultural experiment stations.

When the prosperity of the American farm evaporated after World War I, *see* GARDNER, *supra*, at 1, Congress responded with a host of legislative elixirs in an attempt to remedy the problem, including: price controls, Agricultural Marketing Act of 1929, 46 Stat. 11, increased tariffs, Smoot-Hawley Tariff Act, 46 Stat. 686 (1930), and supply-control measures, Agricultural Adjustment Act of 1933, 48 Stat. 31. *See also* Howard B. Pickard, *Price and Income Adjustment Programs in* 1 AGRICULTURAL LAW 3 (John H. Davidson, ed. 1981) ("Modern farm legislation had its origins from the depression years of the early 1930s."). It was also during these years that Congress began to assert the full breadth of its Article I, section 8 powers, oft-times in the name of the farm. For example, the Agricultural Adjustment Act of 1938, upheld in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), stands as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *United States* v. *Lopez*, 514 U.S. 549, 560 (1995).

In addition to the broad price-stabilizing programs of the New Deal, Congress also enacted legislation affecting almost every aspect of the farm. *See, e.g.*, Agricultural Marketing Act of 1946, Pub. L. No. 79-733, 60 Stat. 1082, codified, as amended, at 7 U.S.C. § 1621 *et seq*. (providing for the inspection, grading, packaging and labeling of agricultural products). Pesticide regulation is no exception.

For nearly a century, Congress has regulated pesticide efficacy and labeling, beginning with the Insecticide Act of 1910. Ch. 191, 36 Stat. 331. In 1947, Congress replaced that regime with FIFRA. Both statutes were aimed at "protecting consumers from the purchase of ineffective products. However, the coverage of [FIFRA] was substantially

broadened, a purpose to protect the public from the hazards associated with the use of economic poisons was implemented, and, for the first time, all economic poisons were required to be registered with the Secretary of Agriculture." *Stearns Elec. Paste Co.* v. *EPA*, 461 F.2d 293, 302 (7th Cir. 1972).

In 1954, Congress further asserted primacy over agricultural production and pesticide regulation when it amended the Federal Food, Drug, and Cosmetic Act to authorize the Secretary of Health, Education and Welfare to establish tolerances with respect to pesticide use on raw agricultural products. Pub. L. No. 83-518, 68 Stat. 511 (1954). The law specifically allowed FIFRA pesticide registrants to petition the Secretary to establish a tolerance level for their pesticides, or exempt them from the tolerance requirement. The Act required petitions to contain data showing, among other things, "full reports of investigations made with respect to the safety of the pesticide chemical." *Id*. at § 408(d).

Congress amended FIFRA in 1972 to provide increased authority to EPA and added the preemption provisions codified at 7 U.S.C. § 136v. *See* Federal Environmental Pesticide Control Act, Pub. L. No. 92-516, § 24, 86 Stat. 973, 997 (1972). These amendments further strengthened FIFRA as "a comprehensive regulatory statute,'" *Mortier*, 501 U.S. at 601 (quoting *Monsanto*, 467 U.S. at 991).

Against this backdrop, it is not reasonable to assume that Congress intended to tread lightly in preempting state law. Such an assumption may well hold where "Congress has legislated in a field which the States have traditionally occupied." *Medtronic*, 518 U.S. at 485 (quoting *Rice*, 331 U.S. at 230). In such cases, state regulation is primary, and Congress is assumed to act only interstitially. But where, as in agricultural production, Congress has legislated pervasively, the background interpretive principle shifts—certainly not to disfavor, and more likely to prefer, federal displacement of state law.

Put another way, it would seem odd in the very least to assume that, after more than sixty years of regulating pesticide labeling, Congress intended generally to protect state regulatory authority in 1972 when it further "'transformed FIFRA from a labeling law into a comprehensive regulatory statute.'" *Mortier*, 501 U.S. at 601 (quoting *Monsanto*, 467 U.S. at 991).

The proper application of the presumption against preemption is where Congress has only acted interstitially to supplement State regulation. The long and significant federal history in regulating agricultural production and pesticide marketing counsels against applying the presumption here. Instead, the Court should apply everyday principles of statutory construction in a straightforward manner, without utilizing an artificial thumb-on-the-scale presumption.

II. FIFRA EXPRESSLY PREEMPTS COMMON LAW DAMAGE CLAIMS RELATING TO LABELING OR PACKAGING.

The plain text of FIFRA demonstrates that Congress intended to displace state common law actions relating to labeling or packaging of products subject to FIFRA's statutory requirements. This Court has twice held that the term "requirements" in express preemption provisions includes common law tort actions. *See Cipollone*, 505 U.S. at 521 (plurality); *id.* at 548-49 (Scalia, J., concurring in judgment in part and dissenting in part); *Medtronic*, 518 U.S. at 504 (Breyer, J., concurring in part and concurring in judgment); *id.* at 509 (O'Connor, J., concurring in part and dissenting in part). There is no reason to think that "requirements" has a different meaning in section 136v(b). It is of no moment that section 136v(b) relates back to section 136v(a)'s authorization of states to "regulate" and its references to such state "regulation." "[State] regulation can be as effectively exerted through an award of damages as

through some form of preventive relief." *Cipollone*, 505 U.S. at 521 (quoting *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)).

It is irrelevant whether the Environmental Protection Agency has waived data requirements for, or actually evaluates, product efficacy prior to registering a product and approving its labeling and packaging. Section 136v(b) prohibits state law requirements for labeling and packaging other than "those required under this subchapter." Under that subchapter, section 136a(c)(7) allows EPA to conditionally register a pesticide without receiving or reviewing efficacy data, but only if, among other things, the pesticide's "composition is such as to warrant the proposed claims for it" and if "it will perform its intended function without unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5). The 1978 Amendments did not rescind or alter the requirement that the pesticide be effective, but simply authorized the EPA not to require data submission or to evaluate product efficacy prior to registration. Product efficacy is therefore still "required under this subchapter" and within section 136v(b)'s preemptive scope, regardless of the EPA's decision as to whether, when, and how to monitor compliance or enforce violations of that requirement.

A. FIFRA's Preemption of State Law "Requirements" Includes Common Law Claims for Damages.

This Court has twice held that the term "requirements" in express preemption provisions includes common law tort actions. *See Cipollone,* 505 U.S. at 521 (plurality); *id.* at 548-49 (Scalia, J., concurring in the judgment in part and dissenting in part); *Medtronic*, 518 U.S. at 504 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 509 (O'Connor, J., concurring in part and dissenting in part).

In *Cipollone*, the Court interpreted the reach of the Cigarette Labeling Act, as amended, which provided: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87. Much like Petitioners here, Cipollone argued that the provision did not preempt common law actions. *See Cipollone*, 505 U.S. at 521 (plurality).

Six justices explicitly rejected this contention, four of them reasoning that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive law enactments and common law . . . ." *Id.* (Stevens, J., with whom Rehnquist, C.J., White and O'Connor, J.J., joined, writing for a plurality of the Court as to part V) (second alteration in original); *see also id.* at 548-49 (Scalia, J., with whom Thomas, J., joined, concurring in the judgment in part and dissenting in part). Writing for the four-justice plurality, Justice Stevens continued, "those words *easily* encompass obligations that take the form of common-law rules." *Id.* at 521 (plurality) (emphasis added). "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.* (quoting *San Diego Bldg. Trades Council*, 359 U.S. at 247).

Similarly, in *Medtronic* five justices held that the word "requirements," as used in the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act, "'easily'" encompassed tort actions. *Medtronic*, 518 U.S. at 504 (Breyer, J., concurring in part and concurring in the judgment) (quoting *Cipollone*, 505 U.S. at 521); *id.* at 510-11 (O'Connor, J., with whom Rehnquist, C.J., Scalia and Thomas, J.J., joined, concurring in part and dissenting in part).

There is no reason to think that the term "requirements" as used in section 136v(b) has a different meaning than in the Cigarette Labeling Act or in the Medical Device Amendments. Indeed, since *Cipollone*, the federal circuit courts have been in unanimous accord: FIFRA's preemption provision embraces state tort actions relating to the labeling or packaging of pesticides.[2] Eighteen state supreme courts agree.[3]

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[2] *Lowe's Home Cntrs., Inc.* v. *Olin Corp.*, 313 F.3d 1307 (11th Cir. 2002), *reh'g and reh'g en banc denied*, 61 Fed. Appx. 673 (11th Cir. 2003) (table); *Netland* v. *Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir.), *cert. denied*, 537 U.S. 949 (2002); *Nathan Kimmel, Inc.* v. *DowElanco*, 275 F.3d 1199 (9th Cir. 2002); *Ruiz-Guzman* v. *Amvac Chem. Corp.*, 243 F.3d 549 (9th Cir. 2000); *Hawkins* v. *Leslie's Pool Mart, Inc.*, 184 F.3d 244 (3d Cir. 1999); *Andrus* v. *AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999); *Lescs* v. *William R. Hughes, Inc.*, 168 F.3d 482 (4th Cir. 1999), *cert. denied*, 528 U.S. 1119 (2000); *Nat'l Bank of Commerce (Arnold)* v. *Dow Chem. Co.*, 165 F.3d 602 (8th Cir. 1999); *Kuiper* v. *Am. Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998); *Rodriguez* v. *Am. Cyanamid Co., Inc.*, F.3d 485, (9th Cir. 1997); *Grenier* v. *Vt. Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996); *Welchert* v. *Am. Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995); *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Lowe* v. *Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995); *Bice* v. *Leslie's Poolmart, Inc.*, 39 F.3d 887 (8th Cir. 1994); *MacDonald* v. *Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Worm* v. *Am. Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *King* v. *E.I. DuPont de Nemours & Co.*, 996 F.2d 1346 (1st Cir. 1993); *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); *Papas* v. *Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied sub nom. Papas* v. *Zoecon Corp.*, 510 U.S. 913 (1993); *Arkansas-Platte & Gulf P'ship* v. *Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), *cert. denied sub nom. Arkansas-Platte & Gulf P'ship* v. *Dow Chem. Co.*, 510 U.S. 813 (1993); *see also Oken* v. *Monsanto Co.*, 371 F.3d 1312 (11th Cir. 2004).

[3] *Etcheverry* v. *Tri-Ag Service, Inc.*, 993 P.2d 366 (Cal. 2000); *Banks* v. *ICI Americas, Inc.*, 450 S.E.2d 671 (Ga. 1994); *Kawamata Farms, Inc.* v. *United Agri Prods.*, 948 P.2d 1055 (Haw. 1997); *Dow Chem. Co.* v. *Ebling*, 753 N.E.2d 633 (Ind. 2001); *Wright* v. *Am. Cyanamid Co.*, 599 N.W.2d 668 (Iowa 1999); *Ackerman* v. *Am. Cyanamid Co.*, 586 N.W.2d 208 (Iowa 1998); *Ackles* v. *Luttrell*, 561 N.W.2d 5730 (Iowa 1997);

Notwithstanding the overwhelming weight of authority, Petitioners point to the fact that "'requirements' is used 75 times in the remainder of FIFRA." Pet. Br. at 22. "The use of 'requirements' throughout FIFRA," Petitioners argue, "demonstrates that Congress understood labeling 'requirements' to refer only to labeling commands imposed by statute and regulation, . . . connoting positive commands of law." *Id.* This argument is unpersuasive. The Cigarette Labeling Act, as amended, uses "requirements" six times in different contexts outside the preemption provision. *See* 15 U.S.C. §§ 1333, 1336, 1340. Likewise, the Medical Device Amendments employ "requirement" 109 times, not counting the preemption clause. *See* 21 U.S.C. §§ 351, 352, 360, 360c, 360d, 360e, 360i, 360j. Meaning matters; numbers do not.

There is likewise little merit to Petitioners' argument that the modifier "such" in section 136v(b) makes that clause a

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Schuver v. *E.I. Du Pont de Nemours & Co.*, 546 N.W.2d 610 (Iowa 1996); *Clubine v. Am. Cyanamid Co.*, 534 N.W.2d 385 (Iowa 1996); *Jenkins* v. *Amchem Prods, Inc.*, 886 P.2d 869 (Kan. 1994), *cert. denied*, 516 U.S. 820 (1995); *Hopkins* v. *Am. Cyanamid Co.*, 666 So. 2d 615 (La. 1996); *Hochberg* v. *Zoecon Corp.*, 657 N.E.2d 1263 (Mass. 1995); *Goeb* v. *Tharaldson*, 615 N.W.2d 800 (Minn. 2000); *Eyl* v. *Ciba-Geigy Corp.*, 650 N.W.2d 744 (Neb. 2002), *cert. denied*, 539 U.S. 958 (2003); *Pfeifer* v. *E.I. Du Pont de Nemours & Co.*, 606 N.W.2d 773 (Neb. 2000); *Davidson* v. *Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, 507 U.S. 1051 (1993); *Lewis* v. *Am. Cyanamid Co.*, 715 A.2d 967 (N.J. 1998); *DiPetrillo* v. *Dow Chem. Co.*, 729 A.2d 677 (R.I. 1999); *Eide* v. *E.I. Du Pont de Nemours & Co.*, 542 N.W.2d 769 (S.D. 1996); *Quest Chem. Corp.* v. *Elam*, 898 S.W.2d 819 (Tex. 1995); *Goodwin v. Bacon*, 896 P.2d 673 (Wash. 1995); *All-Pure Chem. Co.* v. *White*, 896 P.2d 697 (Wash. 1995); *Hue* v. *Farmboy Spray Co.*, 896 P.2d 682 (Wash. 1995); *Gorton* v. *Am. Cyanamid Co.*, 533 N.W.2d 746 (Wis. 1995), *cert. denied*, 516 U.S. 1067 (1996). Although the Hawaii and Idaho Supreme Courts agree that FIFRA preempts generally, they have held that it extends only to label statements required by the EPA, not to statements voluntarily furnished by the manufacturer. *See Walker* v. *Am. Cyanamid Co.*, 948 P.2d 1123, 1128 (Idaho 1997); *Kawamata Farms*, 948 P.2d at 1080.

"subset" of section 136v(a), and thus renders "requirements" to mean something other than its plain and accepted definition. Petitioners argue that the term "requirements" must be "viewed through the lens of the 'regulation[s]' a State is permitted to issue in section 136v(a)." Pet. Br. 17. The alteration in the preceding quotation is Petitioners', and it makes all the difference. Section 136v(a) speaks of a State's authority to "regulate" and uses "the regulation" to denote the act of regulating (which cannot be pluralized), not necessarily to describe the form of positive law (of which there can be plurals). Thus, although "laws and regulations" denotes "positive enactments" when used together, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 63 (2002), "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *Cipollone*, 505 U.S. at 521 (quoting *San Diego Bldg. Trades Council*, 359 U.S. at 247) (alteration in original). As Justice Breyer explains, "[t]he effects of the state agency regulation and the state tort suit are identical. To distinguish between them for pre-emption purposes would grant greater power (to set state standards 'different from, or in addition to' federal standards) to a single state jury than to state official acting through state administrative or legislative processes." *Medtronic*, 518 U.S. at 504 (Breyer, J., concurring in part and concurring in judgment).

B. Whether the EPA Actually Evaluates Product Efficacy is Irrelevant to the Interpretation of Section 136v(b), Which Turns on Whether Product Efficacy is a Requirement under FIFRA.

It is irrelevant to the analysis whether the EPA has waived data requirements for or actually evaluates product efficacy prior to registering a particular product and approving its labeling and packaging. Section 136v(b) prohibits state law requirements for labeling and packaging other than "those

required under this subchapter." Under that subchapter, section 136a(c)(5) requires the EPA to register a product if, among other things, the EPA finds that "its composition is such as to warrant the proposed claims for it" and if "it will perform its intended function without unreasonable adverse effects on the environment."

Petitioners argue that the EPA waiver of data submission for, and pre-registration evaluation of, product efficacy puts product efficacy claims outside the preemptive scope of section 136v(b). "Congress specifically amended FIFRA to eliminate a requirement that the EPA evaluate a pesticide's efficacy, so § 136v(b)'s 'requirements' do not properly encompass common-law claims addressing efficacy." Pet. Br. 29. This contention misconstrues the 1978 Amendments and the effect of the EPA waiver.

The 1978 Amendments did not change the requirements under FIFRA; they merely provided the EPA with flexibility when reviewing a product's efficacy. Under FIFRA, the EPA must register a pesticide if it finds that "its composition is such as to warrant the proposed claims for it," 7 U.S.C. § 136a(c)(5)(A), and "it will perform its intended function without unreasonable adverse effects on the environment," 7 U.S.C. § 136a(c)(5)(C). The 1978 Amendments authorized the EPA Administrator to "waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy." 7 U.S.C. §136a(c)(5). The 1978 Amendment also permitted conditional registration, as long as the pesticide otherwise complies with federal law and the registrant submits the same data required for registration under section 136a(c)(5). 7 U.S.C. § 136a(c)(7).

Although the 1978 Amendments permitted the EPA to waive "data requirements," it did not alter or rescind the general requirement that a pesticide shall be registered if the

EPA finds that "its composition is such as to warrant the proposed claims for it." 7 U.S.C. § 136a(c)(5). As a result, manufacturers still must provide efficacy data if the EPA so requests. 40 C.F.R. § 158.640(b)(1); 40 C.F.R. § 158.540. Moreover, manufacturers must report to the EPA when they learn that their products have harmed a non-target organism, such as the crop that the pesticide was designed to protect. 40 C.F.R. § 159.184(a)(1). The 1978 Amendments also left unaltered FIFRA's penalties for submitting a false or misleading label. 7 U.S.C. § 136j(a)(1)(E).

Far from rescinding the product efficacy requirement under FIFRA, Congress merely gave the EPA authority to choose whether to require data submission, and when and how to enforce the product efficacy requirement. Congress could have repealed the product efficacy requirement. That it did not do so, but instead gave EPA flexibility in enforcing the requirement, reaffirms that the product efficacy provision remains one of "those required under this subchapter." 7 U.S.C. § 136v(b). Product efficacy is therefore still within section 136v(b)'s preemptive scope, regardless of EPA's decision as to whether, when, and how to monitor compliance or enforce violations of that requirement.

Petitioners' reliance on actual EPA regulation as the hallmark of preemption compounds the error in *American Cyanamid Co.* v. *Geye*, 79 S.W.3d 21 (Tex. 2002), *cert. denied*, 539 U.S. 969 (2003). The Texas Supreme Court there focused only on the question of regulatory conflict preemption—whether there is actual EPA regulation and whether state law conflicts with such regulation. That analysis is required by the Supremacy Clause regardless of whether there is any other congressional expression of preemptive intent. FIFRA empowers the EPA to regulate pesticides; such regulations have the force of federal law. If state law conflicts with such federal regulatory requirements, then in classic conflict preemption fashion the Supremacy Clause

requires judges to enforce the federal regulation instead of the state law. *See Geier* v. *Am. Honda Motor Co.*, 529 U.S. 862, 874-75 (2000).

What the Texas Supreme Court did not consider, and what Petitioners insist that this Court ignore, is that section 136v(b) expands the scope of the federal law with which state law can conflict in two very significant ways. First, it expands the breadth of potential conflict by prohibiting any state regulation of labeling or packaging "in addition to or different from" federal requirements. 7 U.S.C. § 136v(b). Thus, any state law that is in addition to or different from federal law conflicts with section 136v(b) and therefore displaced by the Supremacy Clause. Absent this provision, supremacy only displaces those state laws that are in conflict with—not those that are in addition to or different from—a substantive federal requirement.

Second, section 136v(b) displaces state labeling requirements that differ "from those required under this subchapter." 7 U.S.C. § 136v(b). On its face, the provision expands preemption beyond conflict with actual EPA regulatory activity. All that is required under the express preemption provision is that the state imposes a requirement that is different from those required by FIFRA. So long as product efficacy remains a FIFRA requirement, state requirements relating to product efficacy are preempted. It is irrelevant whether, when or how EPA enforces this requirement; all that matters for the purposes of section 136v(b) and express preemption is that FIFRA requires it.

The Texas Supreme Court may perhaps be faulted for not considering the effect of section 136v(b). Petitioners, however, would have this Court ignore the plain text of section 136v(b) altogether. Their argument that preemption is dependent on actual EPA regulations renders section 136v(b) devoid of meaning and superfluous to the preexisting legal effect of the Supremacy Clause.

Medtronic, Inc. v. *Lohr*, 518 U.S. 504 (1996), is not to the contrary. Justice Breyer's controlling opinion there emphasized the ambiguous language of the preemption provision at issue and the existence of an agency regulation preempting only state claims that are "*divergent*" from "*specific* [federal] requirements applicable to a particular device." *Id.* at 506 (Breyer, J., concurring in part and concurring in the judgment) (emphases and alteration in original). There is no similar ambiguity in section 136v(b) and no limiting agency interpretation.

In *Medtronic*, Justice Breyer described the Medical Device Amendment's preemption provision as "highly ambiguous," and determined that such ambiguity counseled against finding that the provision preempted the tort claims at issue. *Id.* at 505. The MDA prohibits states from establishing or continuing in effect "any requirement" different from or in addition to "any requirement" applicable under federal law, and which relates to the safety or effectiveness of the device "or to any other matter included in a requirement applicable to the device" under the MDA. Describing the provision's ambiguity, Justice Breyer noted that "[t]he words 'any [state] requirement' and 'any [federal] requirement,' for example, do not tell us *which* requirements are at issue, for *every* state requirement that is not identical to even one federal requirement is 'different from, or in addition to' that single requirement." *Id.* (emphasis in original). He concluded that Congress could not have intended the MDA to have such broad preemptive reach, and that it must have expected courts to look the actions of the relevant administrative agency for preemption guidance. *Medtronic*, 518 U.S. at 505-6.

Section 136v(b) is not burdened by the same ambiguity. Section 136v(b) prohibits States from imposing or continuing in effect "any requirements for labeling and packaging" in addition to or different from "those required" under FIFRA. Unlike the MDA provision, whose plain text was virtually

limitless in its preemptive reach, Congress expressly limited FIFRA preemption to any state requirement that would affect pesticide labeling and packaging. By linking the prohibition against any state requirements for labeling or packaging to federal requirements governing the same under FIFRA, section 136v(b) provides "a clear congressional command as to preemption," *id.*, and thus eliminates any need for courts to review agency action for evidence of the federal statute's pre-emptive effect.

Similarly, Justice Breyer and every other Justice in *Medtronic* recognized the importance of the FDA's authority to issue regulations altering the scope of preemption. *Medtronic*, 518 U.S. at 496-97; *id.* at 506 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 511-12 (O'Connor, J., concurring in part and dissenting in part). Justice Stevens explained that his decision was "substantially informed by" the FDA regulations "interpreting the scope of § 360k's pre-emptive effect." *Id.* at 495.

By contrast, there is no EPA regulation altering or limiting the scope of section 136v(b) because "Congress did not give the EPA an analogous role" under FIFRA. *Etcheverry v. Tri-Ag Service, Inc.*, 22 Cal. 4th 316, 330 (2000) (citing *Oliver* v. *Reckitt & Colman, Inc.*, 12 F. Supp. 2d 1287, 1291 (M.D. Fla. 1998). Unlike the MDA, FIFRA does not permit the EPA to exempt state requirements from the statute's pre-emptive effect. In fact, FIFRA's text nowhere links section 136v(b)'s preemptive reach to the issuance of EPA regulations. The only FIFRA provision even close to a statutorily-delegated power of exemption is found in section 136p, which authorizes the EPA to grant emergency exceptions to federal and state regulatory agencies who wish to use FIFRA-registered pesticides for non-labeled uses. This power of statutory exemption relates only to FIFRA section 136j(a)(2)(G)'s otherwise strict prohibition against using any pesticide in a manner inconsistent with its label,

and it is strictly construed by the EPA. *See* 40 C.F.R. Part 166. Section 136p demonstrates that when Congress intends to grant the EPA authority to create exceptions to FIFRA's statutory scheme, it knows how to do so.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Respondents, the decision below should be affirmed.

Respectfully submitted,

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November 24, 2004

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